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No. 00-228

In The Supreme Court Of The United States

MARGARET A. BAGLEY, WARDEN,
Petitioner,

v.

FREDERICK WHITE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The State of Ohio seeks review of a Sixth Circuit decision that ordered Ohio to provide effective and free legal services to all state prisoners who want to challenge the work of their original appellate lawyers once the first-appeal-of-right is finished. According to the court of appeals, the Sixth and Fourteenth Amendments compel that result, even though this Court has long held that a state prisoner's constitutional right to counsel ends once he wins or loses his first-appeal-of-right in the state appellate courts. He is free later to challenge his conviction, his sentence, or the work of his original trial or appellate lawyers, but the State has never been obligated – until now – to provide a lawyer to help him do so.

Respondent White devotes much of his brief in opposition to questions surrounding the adequacy of the

procedural deadline for raising ineffective-assistance-of-appellate-counsel claims in Ohio's state courts. He failed to meet that deadline, but now argues that he was not obligated to do so, because (he claims) Ohio's rule is not regularly followed by the State's courts.

Yet any questions about the adequacy of the state procedural bar that White failed to meet are irrelevant to the question presented here. Certainly, this Court need not address the adequacy issue to resolve the question presented, which is quite distinct from the adequacy issue. The Sixth Circuit itself did not resolve the adequacy question, *see* Pet. App. at 16a ("In any event, we need not focus on whether the good cause exception to Rule 26(B) constitutes an independent and adequate state ground . . . "), and White remains free to raise that issue on remand from this Court once the separate and important question that we raise has been resolved.

If the 90-day deadline in Ohio Appellate Rule 26(B) is inadequate because (as White claims) Ohio's intermediate appellate courts have irregularly applied the rule's "good cause" exception to the 90-day deadline – and we think it is certainly adequate, for the Ohio Supreme Court has *never* found good cause for *any* prisoner's failure to meet that rule's deadline – the rule can be revised, and its enforcement tightened in Ohio's appellate courts. But the question presented here is much broader, for in light of the Sixth Circuit's holding, the States now have a new constitutional obligation to provide effective post-appeal lawyers to their prisoners. More than a simple matter of a flexible or inflexible procedural deadline, the holding of the Sixth Circuit – and, in turn, the question presented – goes to the very heart of the States' duty under the Sixth Amendment to ensure that prisoners are effectively represented in criminal

cases. When does that duty end: once the first-appeal-of-right is finished – as both state and federal courts have always said – or later, only after every prisoner has been given a second free and effective appellate lawyer to challenge the work of his first one? That critically important constitutional question stands apart from any ancillary question about the adequacy of Ohio's 90-day deadline for raising ineffective-assistance claims.[1]

Turning to the merits of the question presented, respondent White simply says that legal challenges to appellate counsel's effectiveness must be raised as part of the direct appeal process in Ohio, rather than in a post-conviction proceeding. That response does not address the constitutional issue that we raise – and that the Sixth Circuit resolved – for no one disputes that Ohio's rules specify a particular place and time for raising appellate-ineffectiveness claims in the State's courts. The issue, rather, is whether the State must provide *counsel* to its prisoners when they raise that type of claim in whatever forum the State requires.

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[1] White's statement that "Rule 26(B) was not in effect until two years after Mr. White filed his application to reopen in the court of appeals" (Br. in Opp. at 6) – thereby suggesting that he had no obligation to follow that rule's deadline in 1993-94 – not only runs counter to the scores of Ohio appellate and supreme court decisions in which that rule was applied during that time period, but runs counter to the facts of his own case as well. Both the Ohio court of appeals and supreme court found that White should have, but did not, comply with the Ohio rule's 90-day deadline for raising his ineffective-assistance-of-appellate-counsel claim, *see* Pet. App. at 44a-45a, 48a-51a, and the federal magistrate judge and the district court agreed, *see* Pet. App. at 26a, 37a-40a. Indeed, even the Sixth Circuit agreed with us on this point, explaining that "there was an applicable rule in place and . . . White failed to follow it." Pet. App. at 13a.

White does not confront that issue, nor show why this case is a poor vehicle for resolving it.

The Sixth Circuit's published decision squarely holds that the Sixth Amendment imposes on Ohio (and presumably all other States) an obligation to provide free and effective post-appeal lawyers to those prisoners who have lost in their first-appeal-of-right. Whatever label respondent White (or any State) gives to that process – whether post-appeal, or post-conviction or direct appeal – surely the constitutional obligation does not vary from State to State. If, as has always been true, the State's obligation to provide counsel ends when the state appellate court affirms the prisoner's conviction and sentence in the first-appeal-of-right, then no different reading of the Sixth Amendment should apply in Ohio or in the Sixth Circuit. If instead, the Sixth Circuit has correctly held that States must now provide "constitutionally-mandated counsel," Pet. App. at 19a, to prisoners even many years after the first-appeal-of-right has ended, then many state prisoners across the country are being deprived of that constitutional right, and their entitlement to it ought not turn on the particulars of any given State's procedures for raising post-appeal challenges to appellate counsel's effectiveness.[2]

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[2] White's view that "claims of appellate ineffectiveness . . . may only be asserted in proceedings that are part of a first, direct appeal of right," (Brief in Opp. at 14), not only stands at odds with Ohio's rules, *see* Ohio App. Rule 26(B) (Pet. at 3) (explaining that a prisoner's challenge to the work of his appellate lawyer can only begin after "journalization of the appellate judgment" affirming the prisoner's conviction and sentence in the first-appeal-of-right), but also would require each prisoner's appellate lawyer in a first-appeal-of-right to argue his or her own ineffectiveness. Of course, neither Ohio nor any other State requires such a counterintuitive procedure.

The point of our question is *not* the label that Ohio or any other State attaches to its procedure for raising ineffective-assistance-of-appellate-counsel claims in state court. No doubt, some States direct prisoners to file those claims in state appellate courts, while other States direct prisoners to do so in state trial courts. Yet, regardless of the label attached to the procedure, or the court in which prisoners may raise such a claim, the critical point here is that no State – until now – has ever had to provide a free and constitutionally-effective lawyer to its state prisoners once the first-appeal-of-right ended.

In White's case, his first-appeal-of-right ended in 1991, when the state court of appeals issued its decision in his case. He could then have continued the direct appeal process by seeking discretionary review of the appellate court judgment in Ohio's supreme court and then in this Court, but while either of those later proceedings (which he did not pursue) would have been properly designated part of White's *direct appeal*, neither one could appropriately be described as part of the his *first-appeal-of-right*, and in neither of them did he enjoy a Sixth Amendment right to counsel.

Likewise, under Ohio's rules (like the rules in other States), White was free to raise an ineffective-assistance-of-appellate-counsel claim in the State's courts once his first-appeal-of-right ended in 1991. But neither Ohio nor any other State has ever found in the Sixth Amendment any obligation to provide a free and constitutionally-effective lawyer to help a prisoner like White raise such a claim, whether in a direct appeal or in post-conviction, any more than they have seen an obligation in the Sixth Amendment to provide counsel at the other stages of a direct appeal that follow the first-appeal-of-right. The critical point is that counsel is only constitutionally mandated during the first-

appeal-of-right, and once that ends, the prisoner is on his own for legal representation, whether in the direct appellate process, or in state post-conviction proceedings.

We are certainly not "asking this Court to . . . force Ohio to create a review process that is not required or even contemplated by the . . . Constitution." (Br. in Opp. at 16.) Indeed, we seek quite the opposite, for we ask only that longstanding constitutional principles be retained. It is the Sixth Circuit that has created a new process, though respondent White oddly contends that the judgment below "accorded . . . respect" (Br. in Opp. at 19) to Ohio's rules. Though Ohio's courts have never seen in the State's rules – or, more importantly, in the Constitution – any requirement that prisoners receive two rounds of free and effective appellate lawyers, and though no other state or federal court of which we are aware has ever imposed such an obligation on the States, the court below has now ordered Ohio and other States to begin providing a new round of free and effective appellate lawyers to challenge the work of each prisoner's original appellate lawyer. By directing that any prisoner (like White) may now undo his state-court conviction if he did not receive free and constitutionally-effective legal assistance after losing his first-appeal-of-right, the court of appeals has undercut the important interests in finality and comity that ought to guide federal courts in habeas cases.

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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